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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. REV. CHARLES EDWARD LEPP, et al., Defendants. _____/	CR 04-0317 MHP MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY TERMS OF PRETRIAL RELEASE TO ALLOW USE OF SACRAMENT PURSUANT TO THE RELIGIOUS FREEDOM RESTORATION ACT

STATEMENT OF FACTS

Rev. Charles Edward Lepp is a sincere and practicing Rastafarian. *See* Declaration of Lepp filed herewith. He is a reverend and the minister of Eddy's Medicinal Gardens and Multi-Denominational Ministry of Cannabis and Rastafari Ministry located in Lake County, California. *Id.* Reverend Eddy Lepp is a minister of the Rastafarian Faith. *Id.* He has been a Rastafarian Christian since 2000.

On or about May 10, 2004, Eddy's Medicinal Gardens and Ministry of Cannabis and Rastafari filed its corporate charter with the State of Nevada. *See* Exhibit A, Corporate Charter.

In November 2000, Rev. Lepp also obtained an honorary

Doctor of Divinity Degree and Doctor of Metaphysics Degree from the Universal Life Church. As of October 27, 2000, Rev. Lepp has been ordained all the rights and privileges to perform all duties of the Ministry by the Universal Life Church. In August 2001, the Universal Life Church also conferred upon Rev. Lepp the Degree of Doctor of Religious Humanities. *See* Exhibit B, Certificates from Universal Life Church.

Further, as a religious sacrament, Rev. Lepp uses ganja or marijuana in the practice of his religion. The sacramental use of ganja in ceremonies is used to bring Rev. Lepp (and his followers) closer to the divinity and to enhance unity among believers. Marijuana - known as ganja in the language of the religion - operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity. The use of this sacrament is essential, necessary and a central component for the exercise and practice of this faith.

Rev. Lepp is currently on pretrial release. He does not want to violate any terms of his release, yet he desires to freely practice his religion. Accordingly, Rev. Lepp herein respectfully seeks the Court's permission to modify or clarify his terms of release so that he is allowed to use marijuana as a religious sacrament, which is central to the practice of his religion.

ARGUMENT

REV. LEPP SHOULD BE ALLOWED THE SACRAMENTAL USE OF MARIJUANA WHILE ON PRETRIAL RELEASE PURSUANT TO THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 .

A. Introduction

The Religious Freedom Restoration Act ("RFRA") was enacted in 1993. In general, the RFRA allows a person whose religious exercise has been burdened by the government to assert a claim or defense and obtain appropriate relief from the government. 42 U.S.C. § 2000bb-1(c) (2005). The RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can demonstrate that the burden on the religion "(1) is in furtherance of a compelling government interest; *and* (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(a)-(b)(2005) (emphasis added).

Here, Rev. Lepp contends that his pretrial release conditions forbidding him to use marijuana violates his religious freedoms, burdens the essential practice of his religion, and the government is unable to demonstrate a compelling government interest that is the least restrictive, justifying such a burden on his religious freedom.

B. The Ninth Circuit Acknowledges Rastafarianism as an Established and Recognized Religion.

In United States v. Bauer, 84 F.3d 1549, 1557 (9th Cir. 1996), the Ninth Circuit became the first appellate court to apply the RFRA to a case involving the religious use of marijuana. The court heralded an important decision in holding

that a Rastafarian's personal possession and use of marijuana gave rise to a valid, religious-exercise defense under the RFRA. *Id.* at 1559. The court's discussion of Rastafarianism indicates that the religion is definitely protected by the RFRA.

Rastafarianism is a recognized religion which first took root in Jamaica in the nineteenth century. There are now many adherents in the United States. United States v. Bauer, 84 F.3d 1549, 1556 (9th Cir. 1996) citing Mircea Eliade, Encyclopedia of Religion 96-97 (1989). Rastafarianism is among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country. *Id*,. citing J. Gordon Melton, Encyclopedia of American Religions, 870-71 (1991).

Standard descriptions of the religion emphasize the sacramental use of ganja in ceremonies designed to bring the believer closer to the divinity and to enhance unity among believers. Bauer at 1556. Functionally, marijuana - known as ganja in the language of the religion - operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity. *Id.*

In Guam v. Guerrero, 290 F.3d 1210, 1212-1213 (9th Cir. 2002), the Ninth Circuit, based upon government stipulation, found that Rastafarianism is a legitimate religion and that marijuana use is sacramental in the practice of that religion. *See also*, fn 2 of Guam v. Guerrero at 1213 citing United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996), "we have previously acknowledged that Rastafarianism is a legitimate religion, in which marijuana plays a necessary and central role."

Accordingly, the Ninth Circuit has already determined and acknowledged Rastafarianism as a legitimate and established religion. Here, Rev. Lepp is a sincere and practicing Rastafarian and the sacramental use of marijuana or ganja is necessary and a central role in the exercise of his religious practices. Pretrial release conditions forbidding the sacramental use of marijuana unduly burdens Rev. Lepp's freedom to exercise and practice his religion.

C. The Current Pretrial Release Conditions Impose a Substantial Burden on Rev. Lepp's Practice of Rastafarianism within the Meaning of the RFRA.

The RFRA forbids the government to "substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The defendant carries the burden in establishing a substantial burden on his religious freedom. The Ninth Circuit has stated that when a defendant meets this requirement, he has established a *prima facie* case of an RFRA violation. *See* Guam v. Guerrero, 290 F.3d at 1222.

In a case decided prior to the enactment of RFRA, the United States Supreme Court stated that a substantial burden on the free exercise of religion exists where a government action places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Thomas v. Review Board of Indiana Employment Sec. Division, 450 U.S. 707, 718 (1981). The U.S. Supreme Court has also stated that a statute burdens the free exercise of religion if it "results in the choice to the individual of either abandoning his religious principal or facing

criminal prosecution." Braunfeld v. Brown, 366 U.S. 599, 605 (1961). Ninth Circuit courts have relied on language from both of these Supreme Court cases in interpreting the substantial burden requirement of the RFRA. *See* Guerrero, 290 F.3d at 1222; *see also*, United States v. Valrey, 2000 U.S. Dist. LEXIS 22390 at *6.

In Goehring v. Brophy, 94 F.3d 1294, 1299 (9th Cir. 1996), the Ninth Circuit explained its standard for the substantial burden requirement under the RFRA:

> To show a free exercise violation, the religious adherent ... has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; *the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine*.

(quoting Graham v. Commissioner, 822 F.3d 844, 850-851 (9th Cir. 1987) (emphasis added) (citations omitted)). In Goehring, plaintiffs were state university students who claimed the University's mandatory student registration fee violated their free exercise of religion because the fee was used to subsidize the school health insurance program, which covered abortion services. Goehring, 94 F.3d at 1297. The Ninth Circuit held that plaintiffs failed to prove a substantial burden on their exercise of religion because students were not required to purchase the subsidized health insurance, the subsidy from registration fees was not a substantial sum of money, plaintiffs were not required to be associated with abortion services in any

manner, and the insurance program did not interfere with their access to public education. *Id.* at 1300. The court recognized that the plaintiffs' religious beliefs prohibited them from financially contributing to abortions, but stated "merely because the University has conceded that the plaintiffs' beliefs are sincerely held, it does not logically follow, as the plaintiffs contend, that any governmental action at odds with these beliefs constitutes a substantial burden." *Id.*

In Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110 (9th the Ninth Circuit relied on its Goehring standard in interpreting the substantial burden requirement under the RFRA. Plaintiff religious organization which held a copyright in a book, brought a copyright infringement action against defendant organization that appropriated the book for religious purposes. Defendant claimed that application of the copyright laws violated RFRA. *Id.* at 1113. The Ninth Circuit held that defendant did not meet RFRA's substantial burden test because paying for permission and the right to use a copyrighted work was perhaps an inconvenience but not a substantial burden on the exercise of religion. *Id.* at 1121.

In Goehring and Worldwide Church, the Ninth Circuit stressed the importance of proving a burden that rises above the level of mere inconvenience. In both decisions, the parties claiming violation of RFRA failed to establish the existence of a burden beyond a (minimal) financial impact. The decisions imply that the Ninth Circuit requires evidence of a burden on the substantive rights for the RFRA claimant.

In the case at hand, Rev. Lepp has proven a substantial burden of his free exercise of religion because the current pre-trial conditions prohibit him from performing one of the essential tenets of his religion, a tenet which the Ninth Circuit itself described as necessary and a central role in the practice of Rastafarianism.

Similarly, and persuasive here, in United States v. Valrey, 2000 U.S. Dist. LEXIS 22390 *10, a Ninth Circuit District Court used the RFRA to modify the conditions of defendant's supervised release in such a way that he was allowed to continue personal use and possession of marijuana "exclusively in connection with practice of his religion." In Valrey, defendant was on supervised release from prison when he tested positive for marijuana, an act that the government claimed violated the terms of his release. *Id.* *2.

The court held that the terms of defendant's supervised release which forbade him to possess and use marijuana amounted to an unjustified substantial burden on his free exercise of religion. The court relied on the parties' joint stipulation about Rastafarianism in finding the existence of a substantial burden: "Rastafarians emphasize the use of marijuana as a means of bringing the believer closer to the divinity and enhancing unity among the believers." *Id.* *5.

Accordingly, if a person on supervised release from prison is allowed to possess and use marijuana for religious purposes, Defendant herein should at least be accorded the same rights while on pre-trial release, who has not been convicted of any offense.

D. The Current Pretrial Conditions Serve No Compelling Government Interest in the Least Restrictive Manner Possible.

Once a defendant establishes that the government has imposed a substantial burden on his free exercise of religion, the burden of proof then switches to the government to prove that the contested governmental actions satisfy strict scrutiny by establishing the existence of a compelling government interest achieved by the least restrictive means. 42 U.S.C § 2000bb-1(b); *see* Goehring v. Brophy, 94 F.3d 1294, 1300.

In order to demonstrate a government action, which substantially burdens the free exercise of religion, satisfies a strict scrutiny analysis, the government must first demonstrate that the action furthers a compelling government interest. 42 U.S.C. § 2000bb-1(b)(1).

1. *Recent U.S. Supreme Court Jurisprudence Allowed a Religious Group Use of a Schedule I Controlled Substance For Sacramental Purposes*.

In Ashcroft v. O Centro Espirita Beneficiente Uniao de Vegetal, 125 S.Ct. 686, 160 L.Ed.2d 518 (2004), the U.S. Supreme Court vacated a stay of injunction that enjoined the government from enforcement of the Controlled Substances Act ("CSA") as it pertained to importation, possession, and distribution of hoasca (containing DMT, a controlled substance) for religious ceremonies. The Court's ruling effectively granted defendant, a small religious organization ("UDV"), the right to import, possess, and distribute hoasca under religious freedom rights and thereby exempted the group from application of the CSA for those purposes. Although the Court did not issue a written decision,

it impliedly affirmed the decisions of the lower courts in its ruling.

The above ruling originated from O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004), cert. granted 2005 U.S. Lexis 3326, 4/18/05, wherein the Tenth Circuit en banc affirmed a ruling by a three-judge panel upholding the granting of a preliminary injunction barring the government from interfering in the religious use of hoasca, a substance containing DMT which is a schedule I controlled substance under the CSA. Hoasca is used as a religious sacrament by the Union of the Vegetable's (UDV), a Brazilian religion.

While the U.S. Supreme Court granted certiorari, the law is still of precedential value and import in its holding that the U.S. government cannot bar the sacramental use of a drug even when it is listed under the CSA. Further, the fact that the U.S. Supreme Court vacated the temporary stay of the injunction, which was sought by plaintiff, John Ashcroft, and that three courts prior, including the Tenth Circuit en banc, all agreed on the meritorious nature of the preliminary injunction, gives credence to the weight and legal grounds of the ruling.

Here, Rev. Lepp argues that this Court should rely on O Centro, which held that government cannot bar or prohibit the sacramental use of a drug, even when it is listed as a Schedule I drug under the CSA.

In the first of two decisions by the Tenth Circuit, the court's discussion of the RFRA is instructive for the case at

hand. O Centro, 342 F.3d 1170 (10th Cir. 2003).[1] The government argued three compelling interests in its prohibition of hoasca: "protection of the health and safety of [UDV] members; potential for diversion from the church to recreational users; and compliance with the 1971 United Nations Convention on Psychotropic Substances." O Centro, 342 F.3d at 1173. The Tenth Circuit walked through each of these arguments and individually rejected them; only the first two government arguments are relevant to this case.

With regard to the health and safety protection argument, the court found that the government failed to demonstrate danger to UDV members' health from sacramental hoasca use. *Id.* at 1182. In doing so, the court rejected the government's recitation of criteria for listing a substance on CSA Schedule I and reliance for the general danger of hallucinogens. *Id.* The court stated that the government's burden under RFRA was "to demonstrate a ban on hoasca use by the [UDV], not a ban on hallucinogens in general, promotes a compelling interest in health and safety." *Id.* The court stated that the government may substantially burden a person's exercise of religion "'only if it demonstrates that *application of the burden to the person* furthers a

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[1] In its first decision, the Tenth Circuit vacated the emergency stay of injunction that it had originally granted, thereby affirming the district court's preliminary injunction against the government. *O Centro*, 342 F.3d at 1187. The Tenth Circuit then reheard the case *en banc*, again reaffirming the district court's grant of preliminary injunction. *O Centro*, 389 F.3d 973 (10th Cir. 2004). For purposes of this memo, the Tenth Circuit's first opinion is more relevant, because the opinion en banc contains only a brief per curiam opinion and lengthy concurring and dissenting opinions.

compelling interest, not merely application of the law in general.'" *Id.* (citation omitted).

In essence, this requires a case-by-case analysis as to each individual or particular circumstance. Further, O Centro instructs that the government cannot just rely on Congressional language in the CSA to justify its practices or generalized language that since a substance is listed as a Schedule I substance, it is *de facto* dangerous. Rather, the government must prove that applying the CSA *to defendant* furthers a compelling government interest.

In its holding, the Tenth Circuit also relied on the testimony from a UDV expert, who stated that the "'set and setting'" in which an individual takes a hallucinogen is critical in determining the experience, and that the setting in which UDV members consumed hoasca minimized danger and optimized safety. *Id.* at 1180. The Tenth Circuit ultimately determined that health and safety was not a compelling government interest for purposes of applying the CSA to UDV members.

Similarly here, Rev. Lepp contends that the manner of usage of his religious sacrament is done within the confines of his religious practice and/or medical necessity (as detailed in his Motion to Modify Terms of Pretrial Release based upon Raich and Medical Necessity). Rev. Lepp's usage itself in the medical context negates any argument of the substance being a danger, because, instead, the substance alleviates and aids his medical sufferings (not a danger or harmful).

Further, many recent studies have been published detailing the medical efficacies of marijuana, which has lead to the recent

movement of the legalization of medical cannabis in states across this country, including not only California, but also Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon and Washington. *See* Raich v. Ashcroft, 352 F.3d 1222, 1229 (9th Cir. 2003) *cert. granted*, 159 L.Ed.2d 811, 124 S.Ct. 2909 (2004). Therefore, any argument proffered by the government beyond the rhetoric of Schedule I classification, is meritless, because marijuana use per se is not dangerous or harmful. Additionally, the manner of usage in accordance with religious principles further minimizes any danger and optimizes safety.

The government's second argument for a compelling government interest was "risk of diversion to non-religious use," which the court again rejected. *Id.* at 1182. The government brought in experts who testified to increased interest in hallucinogens in this country and a belief in substantial risk of abuse of hoasca. *Id.* The court referred to preliminary hoasca studies as "speculation" and "generalized comparisons with other abused drugs." *Id.* The court characterized UDV's expert's testimony as "powerful contradictory testimony." *Id.*

Here, it is incumbent upon the government to produce evidence of any risk of diversion to non-religious use if granted herein. Rev. Lepp contends that the government will be unable to establish any such evidence because his sacramental use is limited to his religious practices in his church and church gatherings. The manner of usage itself is confined and limited, and thereby any risk of diversion to non-religious use is negated.

Lastly, the Tenth Circuit summarily rejected the government's additional arguments for compelling government interest: uniform application of the CSA, need to avoid constant supervision of UDV, and the potential of opening the door to myriad claims for religious exceptions. *Id.* at 1185. Here, this Court should also summarily dismiss any similarly proffered arguments as uncompelling.

Further, in United States v. Valrey, *supra*, wherein a Ninth Circuit District Court permitted the use of marijuana to a Rastafarian, the government argued that because of the correlation between drug use and criminal behavior, the court was required, according to the relevant statute, to prohibit drug use during supervised release. 2000 U.S. Dist. LEXIS 22390 *7. The government argued that the ultimate goal of rehabilitating the defendant justified the burden on his religious freedom. Id. However, the court rejected both arguments, stating that the government offered no proof that defendant was in danger of recidivism as a result of his marijuana use. The court suggested that "the devout practice of his religion in conjunction with the other terms of supervised release *may help ensure Mr. Valrey's rehabilitation*." *Id.* (citation omitted) (emphasis added).

Similarly here, the court can impose other terms of supervised release to ensure that the defendant is not a flight risk or danger to the community.

Therefore, in accordance with established law, Rev. Lepp's use of his religious sacrament while on pre-trial release should be granted since the government is unable to proffer any

compelling interest justifying such a substantial burden placed on his religious freedom.

2. *The Government Must Prove That the Burden on Defendant's Exercise of Religion is the Least Restrictive Means of Furthering the Compelling Governmental Interest.*

If the government is able to prove the existence of a compelling interest, it must next prove that application of the burden to the person "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b)(2). United States v. Valrey, *supra*, again provides good persuasive authority for a religious freedom analysis under RFRA. In Valrey, defendant argued five factors that would accomplish a less restrictive means of furthering the government's interests. Valrey, 2000 U.S. Dist. LEXIS 22390. The five factors argued were: "(1) continued self-reporting of marijuana use, (2) regular urine-testing for other controlled substances, (3) monthly reporting, (4) periodic criminal history checks, and (5) compliance with all of the other incidents of supervision." *Id.* *8-9. The government failed to address this second prong of the test, so the court accepted these alternative means as adequate in ensuring that defendant was not using any other controlled substances and was achieving the goals of the supervised release. *Id.* *9.

In United States v. Bauer, *supra*, the Ninth Circuit did not directly address the issue of whether the government utilized the least restrictive means of achieving a compelling interest, but it did include some language in dicta relevant herein. In remanding the case, the Ninth Circuit stated that the district

court could not treat the existence of marijuana laws as "dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana." Bauer, 84 F.3d at 1559.

Accordingly, the government cannot summarily argue that drug enforcement laws are the least restrictive means of achieving the government goal. Thus, the government will have to provide evidence proving that contested drug enforcement laws are the least restrictive means of achieving its goals.

Here, as evidenced in Valrey, there are other less restrictive means of furthering a compelling government interest (if one can be shown). Again, unless the government succeeds in proving their strict burden, there is no justification for substantially burdening Rev. Lepp's freedom to practice and exercise a central essential tenet of his religion.

CONCLUSION

Based upon the foregoing, Rev. Lepp respectfully requests that his motion be granted herein, and that he be allowed to use marijuana, which is a sacrament in his religion, while on pretrial release.

Dated: May 16, 2005

/s/ J. TONY SERRA
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